19401-3

No. 33539-5

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

State of Washington, Respondent,

v.

Alexander Nam Riofta, Appellant.

OPENING BRIEF OF APPELLANT

Jacqueline McMurtrie
Attorney for Appellant
INNOCENCE PROJECT NORTHWEST CLINIC
University of Washington School of Law
246 William H. Gates Hall
P.O. Box 85110
Seattle, WA 98145-1110
(206) 543-5780
WSBA # 13587

Joshua D. Field
Janel K. Ostrem
Law Student Interns

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I. INTRODUCTION

Appellant Alexander Riofta asks this Court to grant him his statutory right to postconviction DNA testing of a white hat, the sole piece of physical evidence linking the true perpetrator to the crime of which Mr. Riofta was convicted. This is the first instance in which Washington appellate courts have been asked to interpret RCW 10.73.170. The statute provides prisoners access to postconviction DNA testing on evidence that could further their claims of innocence. This statute, passed in March 2005, is the most recent example of the Washington State Legislature's efforts to broaden prisoners' access to potentially exculpatory evidence. Mr. Riofta asks this Court to reverse the trial court's denial of postconviction DNA testing because he meets both the procedural and substantive requirements of RCW 10.73.170.

Mr. Riofta maintains that a DNA test granted under this statute will establish that he was erroneously convicted of a shooting that occurred in the early morning of January 27, 2000. On that day, a man dressed in a black coat and white hat emerged from a stolen Honda and approached seventeen-year-old Ratthana Sok as he left his house for school. From two or three feet away, the man in the white hat pulled a chrome revolver from his pocket. Mr. Sok immediately turned and ran back into his house. Fortunately, the four or five shots fired at Mr. Sok all missed. The shooter

fled, leaving only the spent bullets and the white hat at the scene of the crime.

Despite his persistent claims of innocence, the fact that the eyewitness description of the shooter changed several times and an alibi, Mr. Riofta was arrested and later convicted of first-degree assault with a deadly weapon. At trial, the prosecution was unable to produce any physical evidence connecting Mr. Riofta to the crime, relying only on the eyewitness identification from Mr. Sok. Most significantly, the white hat that all parties agreed was worn by the shooter, left at the scene of the crime and taken into evidence, was never subjected to DNA testing.

The sensitivity of today's DNA testing technology, combined with the CODIS database which contains over 2.6 million DNA profiles of convicted felons, is a powerful tool that could help determine the identity of the actual shooter. DNA testing can be conducted on miniscule amounts of biological material found in the white hat such as sweat, individual skin cells and hair. Unlike eyewitness identification, which is the leading cause of conviction of the innocent, DNA technology is undisputed scientific evidence that could not only prove Mr. Riofta's innocence, but also bring the true shooter to justice. Mr. Riofta asks this Court to reverse the trial court and grant his request to subject the white hat to DNA testing.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when denying Mr. Riofta's request for postconviction DNA testing on the white hat worn by the shooter and left at the crime scene because Mr. Riofta has met the requirements of RCW 10.73.170. Specifically,

    a. Mr. Riofta satisfies the procedural requirements of RCW 10.73.170 because he is "a person convicted of a felony in a Washington state court," "currently serving a term of imprisonment," and has submitted a verified written motion requesting DNA testing to the court that entered his judgment of conviction.

    b. Mr. Riofta satisfies the substantive requirements of RCW 10.73.170 because he has shown how DNA testing on the white hat can identify the true perpetrator and demonstrate his innocence on a more probable than not basis.

2. The denial of Mr. Riofta's motion for postconviction DNA testing violated his right to Due Process under the Fifth and Fourteenth Amendments he was denied access to exculpatory evidence.

III. STATEMENT OF THE CASE

A. Statement of Facts

At approximately 6:40 a.m. on January 27, 2000, seventeen-year-old Ratthana Sok left for school through the open garage door at his home. TR: 177.[1] Mr. Sok noticed an unfamiliar Honda parked outside his house with two or three occupants. TR: 179-81. One of the passengers – who wore a black jacket and a white hat – got out of the car, approached Mr.

[1] The following designations are used to designate the record in *State v. Riofta*, Pierce Co. Sup. Ct. No. 00-1-00511-5: TR = Report of Proceedings for the trial; HR = Report of Proceedings for the Motion for a New Trial; DNA HR = Report of Proceedings for the Hearing on the Motion for Postconviction DNA Testing; CP = Clerk's Papers.

Sok and asked him for a cigarette. Mr. Sok stated that he was not a smoker, and continued to walk towards the gate. TR: 181-82.

At the time of the encounter, it was still dark and only a few street and house lights illuminated the approaching individual. TR: 188-89. As Mr. Sok walked towards the gate, the individual, who was two or three feet away, pulled a chrome revolver from his pocket and pointed it at Mr. Sok's face. In shock, Mr. Sok immediately turned and ran back towards his house as the individual fired four or five shots at him. Every shot missed Mr. Sok and he escaped safely into his house where his mother called the police. TR: 183-86.

It was later discovered that the Honda which the shooter arrived in was stolen less than twelve hours prior to the incident. TR: 287. The white hat that the shooter wore and left at the crime scene belonged to the owner of the stolen car. TR: 289.

In response to the distress call, Tacoma Police Department patrol officer Armin Keen arrived at the Sok residence. TR: 215. Upon arriving, Mr. Sok described the shooter to Officer Keen. TR: 220, 222-223. Mr. Sok subsequently gave a different description of the shooter to another officer. *Compare* TR: 220, 222-223 *with* TR: 204, 246.

Officer Keen testified and noted in his report that Mr. Sok told him that the shooter "looked like Alex" and that the shooter was white. TR:

220, 222-223. Although Mr. Sok later testified that he told the police officers that "it was Alex," not that "it looked like Alex", he agreed that whatever he told the first officer was the truth. TR: 199-200.

After Officer Keen's initial interview, Detective Tom Davidson conducted an additional interview of Mr. Sok. TR: 246. In this interview, Mr. Sok described the shooter as a Cambodian male, 17 or 18 years old, five-two or five-three, light build with a mustache and shaved head." TR: 204, 246. When pressed, Mr. Sok admitted that he had not seen the shooter's head on the day of the shooting because the shooter was wearing a hat at the time. TR: 204. Mr. Sok testified that the police found the white hat the shooter wore outside his house on the sidewalk. TR: 190-92.

After Mr. Sok mentioned the name "Alex" in his identification of the shooter, Detective Davidson conducted an identification procedure. Instead of showing Mr. Sok a photomontage based on a physical description of the assailant, Detective Davidson composed a montage consisting of Asian individuals named "Alex" or "Alexander," without regard to matching the physical attributes identified by Mr. Sok.[2] TR: 247. After Mr. Sok was shown the montage, he identified Alexander Riofta as the shooter. TR: 249. Mr. Sok later said that he knew Mr.

[2] In fact, Detective Davidson testified that many of the pictures used in the photomontage did not match the physical description given by Mr. Sok. TR: 62-67.

Riofta from playing basketball in the neighborhood four or five years prior. TR: 186-187.

Detective Davidson arrested Mr. Riofta at his home the day after the shooting, January 28, 2000. TR: 247-51.

Authorities recovered little evidence from the crime scene. Forensic Specialist Hank Baarslag testified that only a spent bullet and the white hat worn by the shooter were recovered. TR: 230-233. Neither piece of evidence contained fingerprints. TR: 235. Other than the fingerprint analysis, authorities conducted no additional forensic testing of the physical evidence collected at the crime scene. Most significantly, there was no attempt to test for DNA material - found in hair, skin cells or sweat - inside the white hat worn by the shooter. TR: 224-239. Further, the stolen vehicle used in the assault revealed no fingerprints linking Mr. Riofta to the crime and a search of Mr. Riofta's house failed to produce any direct evidence. TR: 258-70.

During Mr. Riofta's interview at the police station, he denied any involvement with the shooting at the Sok residence. He said that he had been out drinking with friends after he got off work, and then walked home, went to bed and slept until 11:00 a.m. the day of the shooting. TR: 252-53. Jennifer Saldana, Mr. Riofta's mother, testified in support of his alibi. When she returned from work at approximately 3:30 a.m. on

January 27, 2000, Mr. Riofta was asleep in his room. TR: 301. Mrs. Saldana stated that she keeps her door open while sleeping so she can hear when someone walks down the hallway, takes a shower, or rings the doorbell. TR: 304. Mrs. Saldana woke up at approximately 11:00 a.m. that day when Mr. Riofta asked her for bus money to get to work. TR: 302.

At trial, the State introduced no physical evidence linking Mr. Riofta to the crime. Instead, the state relied on Mr. Sok's eyewitness identification. The State also introduced circumstantial evidence implying that Mr. Riofta was connected to a gang, and that the January 27th shooting was meant to intimidate Mr. Sok's brother, who at the time was cooperating with the State's investigation and prosecution of the gang-related Trang Dai shooting. TR: 257, 176. The State attempted to connect Mr. Riofta to the gang based on his statement that certain gang members were his "homeys" and because a newspaper article about the gang-related shooting was found in his home. TR: 257. At trial, the defense's primary argument was that the victim – the sole eyewitness in this case – mistakenly identified Mr. Riofta as the shooter.

On November 30, 2000, Alexander Riofta was convicted of first degree assault with a deadly weapon for the shooting. TR: 396. Following this verdict, Mr. Riofta filed a motion to vacate his conviction

and order a new trial under CR 7.8, claiming ineffective assistance of counsel based on trial counsel's failure to raise issues of mental competency, to obtain an expert psychological report, and to call an eyewitness identification expert. HR: 403-62. The trial court denied the motion to vacate on December 14, 2001. HR: 455-462. The Court of Appeals of Washington, Division II, denied Mr. Riofta's appeal on September 2, 2003. *State v. Riofta*, 118 Wn. App. 1025 (2003) and the Supreme Court of Washington denied Mr. Riofta's petition for review on May 4, 2004. *State v. Riofta*, 151 Wn.2d 1019 (2004). A mandate was issued on May 10, 2004.

B. Postconviction DNA Requests

Mr. Riofta initially requested postconviction DNA testing pursuant to the requirements of former RCW 10.73.170.[3] CP: 15-16 (Letter from McCloud to Horne of May 28, 2002). At the time, RCW 10.73.170 afforded the prosecutor decision-making authority regarding postconviction DNA test requests. If the prosecutor denied the request, an appeal could then be submitted to the Office of the Attorney General. Accordingly, Mr. Riofta's appellate attorney Sheryl McCloud requested that the Pierce County Office of the Prosecuting Attorney order a DNA

[3] This statute was amended in March 2005; postconviction DNA requests are now submitted "to the court that entered the judgment." RCW 10.73.170(1). *See infra,* Part III(C)(1)(a).

test on the hat that was worn by the shooter and left at the scene of the crime. CP: 15-16. She argued that the hat – the only piece of physical evidence in this case that could link the shooter to the crime – could contain DNA evidence implicating the actual shooter and thus establish Mr. Riofta's innocence. On June 26, 2002, the Pierce County Prosecutor's Office denied this postconviction DNA request. CP: 18-20 (Letter from Horne to McCloud of June 26, 2002).

Relying on the procedures set out by RCW 10.73.170 as they existed at the time, Mr. Riofta appealed the Prosecutor's denial to the Attorney General's Office. CP: 21-23 (Letter from McCloud to Blonien of July 3, 2002). In this appeal, Ms. McCloud noted that she had since "received [additional] information indicating that the actual shooter is a person with an arrest and conviction history, whose DNA would therefore . . . be available to the state" via the CODIS DNA database. CP: 21-23. Ms. McCloud received this information from attorney Kristi L. Minchau who, at the time, represented Jimmee Chea, a man convicted for his involvement in the Trang Dai murder case. Specifically, Mr. Chea disclosed the identity of the actual shooter in the crime to Ms. Minchau. CP: 24 (Minchau Letter July 29, 2002). Mr. Chea also informed Ms. Minchau that this individual was already incarcerated in Washington for a violent offense. *Id.* However, Ms. Minchau informed the Attorney

General that her client had not "granted permission . . . to disclose the identity of the shooter."[4] *Id.* Ms. Minchau also noted that she found her client's "information to be reliable and accurate, not just occasionally, but always." *Id.* 24. Nonetheless, the Office of the Attorney General denied this appeal under the former RCW 10.73.17 on September 19, 2002. CP: 25-26 (Letter from Blonien to McCloud and Horne of September 19, 2002).

In March 2005, the Washington State legislature amended RCW 10.73.170.[5] The amendments to the statute broadened prisoners' access to DNA evidence and shifted the authority to permit DNA testing from the Prosecutor and Attorney General to the trial court where the prisoner was convicted. Pursuant to the amended law, Mr. Riofta filed his *Motion for Postconviction DNA Testing Under RCW 10.73.170* with the Honorable James Orlando on April 22, 2005. CP: 1-41. Judge Orlando denied the motion on June 10, 2005 in an oral ruling and entered a written Order on September 2, 2005. CP: 63-64 (Order Denying Postconviction DNA Testing). Despite the fact that no direct evidence was found at Mr. Riofta's house linking him to the crime, Judge Orlando referenced "the evidence that was recovered in [Mr. Riofta's] house" as a reason for his

[4] In November 2004, Appellant's counsel spoke with Mr. Chea's counsel, in an unsuccessful attempt to obtain the identity of the shooter. CP: 27 (Woolson and Johnson Decl.).
[5] For the full text of the statute, *see* CP: 14 and Appendix 1(a).

denial of the motion. DNA HR: 14. Judge Orlando also focused on the identification by the victim, stating that "the fact that the victim did know Mr. Riofta previously [and] that Mr. Riofta had been at his house prior to that" bolstered the quality of the victim's identification. DNA HR: 14. Further, although there is no dispute that the white hat that Mr. Riofta requested be tested pursuant to RCW 10.73.170 was worn by the shooter and left at the scene of the crime, Judge Orlando stated, "The fact that there was a hat that may contain some DNA of someone other than Mr. Riofta doesn't put the hat at the scene of the – necessarily at the scene of the shooting in this case." DNA HR: 15. Based on these factors, Judge Orlando concluded, "I don't believe that there is a likelihood that this is the type of evidence that DNA testing would properly demonstrate innocence of Mr. Riofta on a more-probable-than-not basis, so I will deny the motion." DNA HR: 15.

Judge Orlando's Order denying Mr. Riofta's request for postconviction DNA testing was entered on September 2, 2005. CP: 63-64. Mr. Riofta filed a timely appeal, which is the basis of this proceeding. CP: 59-62 (Notice of Appeal to Court of Appeals).

Mr. Riofta also seeks access to postconviction DNA testing through a personal restraint petition filed with this Court on April 22, 2005. *In re Riofta* Case No. 33262-1. In support of this petition, Mr.

Riofta argues that his restraint is unlawful because (a) he was denied Due Process and Sixth Amendment rights when denied access to DNA testing of potentially exculpatory evidence; (b) that his ineffective assistance of counsel claim should be reconsidered in light of new evidence regarding his original counsel's deficient performance; and (c) that he was denied his Sixth Amendment right to effective assistance of counsel. The State filed its Response on August 12, 2005, followed by Mr. Riofta's Reply, filed on October 17, 2005. This Court consolidated Mr. Riofta's *Personal Restraint Petition* with the current case on October 18, 2005.

C. Background

Because this case presents an issue of first impression before the Washington appellate courts, the following background information is provided regarding the history of Washington's statutory right to postconviction DNA testing, how powerful DNA technology has led to the exoneration of at least 164 people in the United States,[6] and what is known about the role mistaken eyewitness identification plays in wrongful convictions.

[6] See the Innocence Project homepage www.innocenceproject.org (last checked December 7, 2005).

1. Washington's Postconviction DNA Statute

a. The Current Statute

On March 9, 2005, the Washington State legislature amended RCW 10.73.170, which addresses the right to postconviction DNA testing. This revision continues a trend in the Washington State legislature to broaden access to exculpatory DNA testing. Under the original version of RCW 10.73.170, passed in 2000, postconviction DNA testing was limited to prisoners sentenced to death or to life in prison without the possibility of parole. *See* Appendix 1(d). Prosecutors were given the authority to determine whether testing was warranted, and a denial could only be appealed to the Office of the Attorney General. *Id.* In 2001, the legislature expanded this DNA testing right to all incarcerated felons. A sunset clause mandated that requests be made by December 31, 2004. *See* Appendix 1(c). In 2005, the current statute was enacted. It removed the sunset provision, broadened the circumstances under which testing was appropriate and placed the decision in the jurisdiction of the courts.[7]

The current statute has both procedural and substantive requirements. Procedurally, in order to be eligible for postconviction DNA testing under the statute, a petitioner must show that he or she has

[7] Under previous versions of the statute, a person requesting DNA testing had to show either that (1) the judge did not allow DNA testing in their case because it didn't meet scientific standards or (2) that DNA technology was not sufficiently developed to test the DNA evidence in the case. *Compare* Appendix 1(a) *with* 1(b), 1(c), *and* 1(d).

been convicted of a felony and is currently imprisoned. RCW 10.73.170(1). In addition, a petitioner must submit a written motion requesting DNA testing to the court that entered the judgment of his or her conviction. *Id.*

There are several substantive requirements for the motion. First, it must state that the testing is required for one of the following reasons: (a) the court ruled that DNA testing in the case did not meet scientific standards; (b) that DNA testing technology was not sufficiently developed to test the evidence in the case; or (c) that the requested DNA testing would be significantly more accurate than prior DNA testing or would provide significant new information. RCW 10.73.170(2)(i-iii). Second, the motion must also "[e]xplain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime or to sentence enhancement." RCW 10.73.170(2)(b). Finally, the motion must comply with all other procedural requirements established by court rule. RCW 10.73.170(2)(c).

Once a proper motion has been submitted, a court is required to grant the motion if "the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3).

b. Legislative History

As Representative Jeannie Darneille – the sponsor of the of the House Bill – stated, the bill that amended RCW 10.73.170 was one of the most agreed upon bills in the legislature in 2004.[8] When the bill was reintroduced in 2005, there was essentially no controversy. No one testified against its passage at either the committee level or on the House or Senate floors. The bill was unanimously pproved in 2005. Final Bill Report SHB 1014 (2005).

Prosecutors, defense attorneys and other members of the legal profession testified in support of the new version of the bill expanding access to DNA testing by prisoners.[9] In a committee hearing before the House Criminal Justice & Corrections Committee, Dan Satterberg, Chief of Staff to King County Prosecutor Norm Maleng, testified that:

> the Association of Prosecuting Attorneys strongly endorses this bill and urge your quick action on it. It is consistent with our mission as prosecutors, which is not just to win convictions but to seek justice . . . I can say that there's nothing more gratifying for a police officer or a prosecutor to be able to go back to a case that we thought

[8] Because of a lack of time, the legislature was not able to vote on the bill in 2004, primarily because of scheduling conflicts. House Bill Report HB 1014 (2005).

[9] Persons testifying in support included Representative Jeannie Darneille, Joanne Moore and Mary Jane Ferguson of the Washington State Office of Public Defense; Dan Satterberg of the Washington Association of Prosecuting Attorneys and King County Prosecuting Attorneys Office; undersigned counsel Jacqueline McMurtrie, Assistant Professor and Director of the Innocence Project Northwest, the Washington Association of Criminal Defense Lawyers, the Washington Defenders Association and Barry Logan, Director of Forensic Lab, Washington State Patrol. House Bill Report HB 1014 (2005).

> we couldn't solve and bring it to justice. But we have an equal obligation to use DNA to seek the truth, even when the truth reveals that we've made a mistake. And we do make mistakes because we're human . . . We think that every inmate convicted of a crime involving forensic evidence deserves that ability to come back and have it tested using today's technology.

Revising DNA Testing Provision: Hearing on House Bill 1014, Before the House Comm. on Criminal Justice & Corrections, January 21, 2005, 2005 Leg., 59th Sess. (WA 2005) (audio *available at* http://www.tvw.org).

This testimony is similar to sentiments expressed when the bill was considered in 2004. Retired King County Superior Court Judge George Finkle testified that "none of us wants an innocent person kept in prison anymore than we want a guilty person to go free or to escape justice." *Revising DNA Testing Provision: Hearing on Senate Bill 6447, Before the Subcomm. on Criminal Justice & Corrections,* 2004 Leg., 58th Sess. (WA 2004) (audio tapes made available by the Secretary of the Washington Senate). Senator Val Stevens echoed the Judge's concerns saying that even worse than "having a person serve a sentence that they did not deserve is to imagine that the real perpetrator is going free. And how can we go after the real perpetrator if we think we've already got him?" *Id.*

2. The Capabilities of DNA Testing

The power and precision of modern DNA technology has led to a remarkable consensus throughout the justice system, among prosecutors

and defense attorneys, conservatives and liberals alike, regarding the benefits of broad access to DNA testing at all stages of criminal proceedings. In the words of former Attorney General John Ashcroft, DNA "has proven itself to be the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent." John Ashcroft, Atty. Gen., News Conference Announcing the DNA Initiative (Mar. 4, 2002).[10]

Today, this "truth machine" is chiefly fueled by the combination of Short Tandem Repeat ("STR") DNA technology and a national DNA database system ("CODIS"). STR testing can take miniscule amounts of biological material such as sweat, skin cells and hair roots and isolate a unique genetic profile. Ian Findlay, et al., *DNA Fingerprinting From Single Cells*, 389 Nature 555 (1997)[11] (noting that STR-DNA testing can often yield reliable results from even a single cell of biological material).[12] Even if the analysis yields multiple DNA profiles from one sample, STR testing is sensitive enough to successfully isolate and identify multiple

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[10] *Available at* http://www.usdoj.gov/archive/ag/speeches/2002/030402newsconferncednainitiative.html.

[11] *Available at* http://www.nature.com/cgitaf/DynaPage.taf?file=/nature/journal/v389/n6651/full/389555a0_fs.html.

[12] In 1998 the Washington State Patrol Crime Lab began using STR technology to test blood samples submitted by convicted felons. In 2000 the Lab began using this technology in case work and in 2001 the Lab began using STR analysis for unsolved cases. *See* Washington State Office of Public Defense, *Postconviction DNA Testing: Report on the Act Relating to DNA Testing of Evidence* 12 (2001), *available at* http://www.opd.wa.gov/Publications/Other%20Reports/12-31-01%20DNA%20Report.pdf.

samples taken from a single piece of evidence. *See People v. Henderson*, 343 Ill. App. 3d 1108, 1119, 799 N.E.2d 682, 692 (Ill. App. Ct. 2003) (quoting C. Strom, *Genetic Justice: A Lawyer's Guide to the Science of DNA Testing*, 87 Ill. B.J. 1820 (1999)). Once a unique genetic profile is isolated, the sample can be compared to over 2.64 million DNA profiles in the national CODIS database to determine whether there is a match. *See* Federal Bureau of Investigation, NDIS Statistics ("NDIS"), *available at* http://www.fbi.gov/hq/lab/codis/national.htm (last visited December 6, 2005).

The CODIS national DNA database system is a vast, computerized state and federal registry of STR-DNA profiles derived from convicted felons. As of December 2005, the CODIS database in Washington State contains more than 82,061 profiles. *See* NDIS at http://www.fbi.gov/hq/lab/codis/wa.htm (last visited December 6, 2005). To date, these profiles have aided in at least 288 investigations in the State. *Id.* This database is one component of the national CODIS database that contains an astonishing 2.64 million unique STR-DNA profiles from convicted felons. *See* NDIS at http://www.fbi.gov/hq/lab/codis/national.htm (last visited December 6, 2005). CODIS enables law enforcement to instantaneously search for a DNA profile match based on 13 genetic markers common to all STR

testing systems. The probability of two unrelated persons matching even the most common of these 13 genetic markers is one in ten billion. *See* National Institute of Justice, U.S. Department of Justice, *Future of Forensic DNA Testing: Predictions of the Research and Development Group* 19 (2000).[13] The rapidly expanding database has allowed law enforcement agencies to solve thousands of "cold cases." Some decades old cases with no leads were solved when a CODIS hit identified the real perpetrator. *See, e.g.*, Rebecca Nolan, *Authorities Say DNA Solves Case from '71*, Register-Guard, Nov. 5, 2003, at D1 (after detective pulled clothing from evidence bag in unsolved 1971 rape, submitted it for an STR test and ran results through CODIS, the DNA profile matched a convicted offender already imprisoned for series of rapes in 1980s).

Although DNA testing is often conducted on fluids such as semen and blood, today's DNA testing is equally effective on non-fluid samples. Mitochondrial DNA testing can even be used on samples like hair shafts, bones and teeth that lack nucleated cells and are therefore not amenable to STR testing. *See* National Institute of Justice, U.S. Department of Justice, *Using DNA to Solve Cold Cases* 6 (2002) [14] The following table lists several innocent men who were exonerated due to the ability to subject

[13] *Available at* http://www.ncjrs.org/pdffiles1/nij/183697.pdf.
[14] *Available at* http://www.ncjrs.org/pdffiles1/nij/194197.pdf.

non-fluid samples – similar to what might be found in the white hat – to sophisticated DNA testing:

Defendant	***DNA Extracted From***	***Source***
Stephen Cowans	saliva, biological material on sweatshirt and hat	Innocence Project, Case Profiles, http://www.innocenceproject.org/case/display_profile.php?id=141
Charles Irvin Fain	hairs	Innocence Project, Case Profiles, http://www.innocenceproject.org/case/display_profile.php?id=92
William Gregory	hairs	Innocence Project, Case Profiles, http://www.innocenceproject.org/case/display_profile.php?id=74
James O'Donnell	fingernail scrapings, saliva	Innocence Project, Case Profiles, http://www.innocenceproject.org/case/display_profile.php?id=68
Ryan Matthews	biological material on ski mask	Innocence Project, Case Profiles, http://www.innocenceproject.org/case/display_profile.php?id=148
Steven Avery	hairs	Wisconsin Innocence Project, http://www.law.wisc.edu/FJR/innocence/AverySummaryPage.htm
Ken Wyniemko	saliva, fingernail scrapings	Kim Shine, *Freed By Science, He Celebrates DNA*, Detroit Free Press, June 18, 2003, at A1.

Powerful DNA testing technology has produced dozens of DNA exonerations in recent years. The technological ability to turn minute traces of biological material into unique DNA profiles and compare those profiles to the vast CODIS database is significant not only to prove innocence, but also to ensure that justice is brought to the actual criminals.

3. Eyewitness Identification

Eyewitness identifications often play a role in convicting the innocent. Nearly forty years ago Justice Brennan noted that "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 1933, 18 L. Ed. 2d 1149, 1158 (1967). Indeed, of the 163 cases where people have been exonerated through postconviction DNA tests in the United States, 125 cases (or 77 percent) involved mistaken eyewitness identification. *See* Innocence Project: Causes and Remedies of Wrongful Convictions, *available at* http://www.innocenceproject.org/causes/mistakenid.php (last visited December 7, 2005). Numerous scientific studies highlight the prominent role that eyewitness misidentifications often play. *See e.g.*, Gary Wells & Elizabeth Olson, *Eyewitness Testimony in* Annual Review of Psychology 277-295 (Susan T. Fisk, Ed. 2003) (noting that eyewitness misidentification is the single largest factor contributing to the conviction of innocent people and citing over 88 studies and reports which further demonstrates the problems associated with eyewitness identifications).

Such research provides insight into how memory works. First, contrary to what many people believe, memory does not function like a video recorder. CP: 28-40 (Geoffrey R. Loftus Letter). Rather, witnesses

take in "fragments" of information from their environment and "integrate" this information with other information that they already have. *Id.* Thus, one's initial memory of an event may be inaccurate simply because other information has shaped his or her perception of the event. *Id.* Second, even if this initial memory was formed accurately, subsequent events can change a person's memory, sometimes dramatically. *Id.* For example, a witness may make inferences about how he or she thinks things *probably* happened, even though the witness did not observe that specific part of the incident. *Id.* Because witnesses often try to make sense of what they have observed, they tend to add logical inferences to their memory of an event and disregard observations that are inconsistent with their story about what happened. *Id.* While a witness may have the best intentions of recalling what he or she believed happened in a given case, the witness' memory may simply be incapable of accurately recalling the sequence of observed events.

In addition to these general principles, some factors make it particularly difficult for a witness to make a correct identification. For example, "unconscious transference" occurs when a victim identifies a person as the perpetrator because the victim has a memory of the person from a time other than the incident in question. Edward M. Connors, et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use*

of DNA Evidence to Establish Innocence After Trial 60 (1996).[15] This problem occurred in Joe Jones' conviction for rape, aggravated kidnapping and aggravated assault in 1986. *Id.* at 59-61. At trial, prosecutors offered testimony from two women who identified Jones as the man they saw abduct the victim outside a nightclub shortly after they all left the establishment. The victim did not pick Mr. Jones out of a photo line-up, but later identified him when she saw him face-to-face. The evidence also established that Jones, a member of the nightclub, was in the club on the evening of the incident. In his postconviction challenges, Mr. Jones asked to present expert witnesses who would testify that identifying Mr. Jones as the assailant was a result of unconscious transference. *Id.* His postconviction challenges were denied. Mr. Jones spent six years in prison and was finally released when prosecutors agreed to DNA testing of forensic evidence, the results of which exonerated him. *Id.*

Another instance of "unconscious transference" occurred in Walter Snyder's case. *See* Hon. Richard C. Wesley, *When Law and Medicine Collide*, 12 Cornell J.L. & Publ. Pol'y 261, 265-266 (2003). Mr. Snyder was convicted of rape, sodomy and burglary of a woman who lived across the street from him. The victim spent a considerable amount of time with her assailant, whom she identified as Mr. Snyder. Postconviction DNA

[15] *Available at:* http://www.ncjrs.gov/pdffiles/dnaevid.pdf (last visited December 2, 2005).

testing later exonerated Mr. Snyder. Even after DNA testing had conclusively established Mr. Snyder's innocence, the victim was unable to reverse her unconscious transference and continued to insist that he was her attacker. *See generally* Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence* 47-77 (2000).

In sum, eyewitness identifications, even when made in good faith, are often inaccurate.

IV. ARGUMENT

Because Mr. Riofta has met both the procedural and substantive requirements of RCW 10.73.170, this Court should reverse the trial court and grant Mr. Riofta's request for postconviction DNA testing. Review of the trial court's decision in this case is de novo. The circumstances of Mr. Riofta's case establish that DNA testing of the white hat – the sole piece of physical evidence connecting the actual shooter to the crime – would likely demonstrate his innocence on a more probable than not basis. Today's sensitive DNA testing could use miniscule amounts of biological material found inside the white hat to create a unique DNA profile that could then be compared to over 2.6 million profiles in the CODIS database. This scientific ability to identify the true shooter, combined with the fact that the prosecution's case against Mr. Riofta was based on circumstantial evidence and a single eyewitness, will likely demonstrate

Mr. Riofta's innocence on a more probable than not basis. Considered with the fact that the Washington Legislature intended to provide prisoners broad access to postconviction DNA testing, Mr. Riofta's request for postconviction DNA testing should be granted.

A. Review of the Trial Court's Denial of Mr. Riofta's Statutory Request for Postconviction DNA Testing is De Novo.

The standard of review on appeal from a trial court's denial of postconviction DNA testing under RCW 10.73.170 is a matter of first impression in Washington. The appropriate standard of review for this Court is de novo because both statutory interpretation and the application of a statute to a particular set of facts are exclusively legal issues. *See State v. Jacobs*, 154 Wn. 2d 596, 600, 115 P.3d 281, 283 (2005) (statutory interpretation involves questions of law which are reviewed de novo); *Welch v. Southland Corp.*, 134 Wn. 2d 629, 632, 952 P.2d 162, 164 (1998) (the proper construction of a statute is a legal matter and should be reviewed de novo); and *Williams v. Dep't of Licensing*, 46 Wn. App. 453, 455, 731 P.2d 531, 532 (1986) ("the question of whether a statute applies to a particular set of facts is a legal issue and fully reviewable on appeal"). The trial court's decision in this case rested on the motions and briefs submitted by the parties and on oral argument. The trial court made no credibility determinations. *See* CP: 63-64, DNA HR: 14-15. Because this

Court has all the same information as the trial court, including a transcript of the oral arguments for Mr. Riofta's request for testing under RCW 10.73.170, there is no basis for deference to the trial court's decision.

Other state appellate courts reviewing denials of postconviction DNA testing requests have also held that de novo review is appropriate. For example, in reviewing requests for postconviction DNA analysis in Illinois, courts have said that the appropriate standard of review on appeal is de novo. *See People v. Hockenberry*, 316 Ill. App. 3d 752, 756, 737 N.E.2d 1088, 1091 (Ill. App. Ct. 2000). There, the court explained that a de novo standard is appropriate because when deciding on such a motion, the trial court's decision "is necessarily based upon its review of the pleadings and the trial transcripts and is not based upon its assessment of the credibility of the witnesses." Therefore, it concluded that "the trial court is not in a better position than the reviewing court to decide the merits of the defendant's motion." *Id.* at 756 (internal citations omitted). *See also State v. Donavan*, 2004 ME 81, 853 A.2d 772, 775 (Me. 2004) (reviewing the trial court's interpretation of Maine's postconviction DNA analysis statute de novo); *Flores v. State*, 150 S.W.3d 750, 752 (Tex. Ct. App. 2004) (application of law-to-fact issues not turning on credibility and demeanor are reviewed de novo, including ultimate issue of whether a

court is required to grant a motion for DNA testing under Texas' DNA testing statute).[16]

Mr. Riofta's request for postconviction DNA testing was decided solely on the basis of legal briefs and oral arguments, which are transcribed for this Court. Therefore, the proper standard of review for this Court is de novo when reviewing the trial court's denial of postconviction DNA testing under RCW 10.73.170.

B. Mr. Riofta Satisfies the Procedural Requirements of RCW 10.73.170.

Mr. Riofta has met the procedural requirements of RCW 10.73.170. He is "a person convicted of a felony in a Washington state court," who is "currently serving a term of imprisonment," and has submitted a verified written motion requesting DNA testing to the court that entered the judgment of conviction. On November 30, 2000, a jury found Mr. Riofta guilty of first degree assault with a deadly weapon, a felony conviction. The Pierce County Superior Court entered a judgment and sentenced Mr. Riofta on December 14, 2001. Mr. Riofta is currently serving his 130-month sentence at Stafford Creek Corrections Center in Aberdeen. On April 22, 2005, pursuant to the amended law, Mr. Riofta

[16] Texas appellate courts use a bifurcated approach in addressing the proper standard of review. Under this scheme, Texas courts afford deference only to a trial court's determination of issues of historical fact and application of law-to-fact issues turning on credibility and demeanor. *See Flores,* 150 S.W.3d at 752.

filed his *Motion for Postconviction DNA Testing Under RCW 10.73.170* with the Honorable James Orlando. Thus, Mr. Riofta satisfies the procedural requirements of RCW 10.73.170.

C. DNA Testing of the White Hat Worn by the Shooter and Discarded at the Scene Will Provide Significant New Information That is Material to the Identity of the Perpetrator.

DNA testing can be conducted on traces of biological material such as single skin cells, sweat, and hair taken from inside the white hat worn by the shooter. Even if several people handled or wore the hat, today's DNA testing can isolate multiple sources of DNA left on the hat. If multiple samples do exist, they can subsequently be compared to Mr. Riofta's DNA, the DNA of the hat's owner, and the DNA of over 2.6 million convicted felons in the CODIS database. The DNA testing process will provide a unique, scientific picture of who wore the white hat.

1. DNA testing of the white hat worn by the perpetrator would provide significant new information.

It is undisputed that in the early morning of January 27, 2000, the shooter wore the white hat that Mr. Riofta seeks to subject to DNA testing and left it at the scene of the crime. Modern DNA testing would provide significant new information regarding the DNA profiles of the individuals – including the shooter – who wore the white hat. STR DNA testing can be performed on single-cell samples such as sweat residue, skin cells or hair roots left in the hat to determine whether Mr. Riofta's DNA profile

exists in the hat. In addition, mitochondrial DNA testing can be conducted on any shafts of hair found in the hat. Results discovered from STR DNA testing can be entered into the CODIS database in an attempt to discover the identity of the true shooter. Unfortunately, none of these tools were used to test any forensic evidence found at the crime scene.

Small amounts of exculpatory DNA evidence from hats have helped to exonerate individuals in the past. In 1997, Stephan Cowans was convicted of shooting a Boston police officer. The evidence against him included, among other things, an eyewitness identification by the surviving victim and testimony by two police department fingerprint analysts that prints taken from the crime scene matched Cowans'. However in 2004, STR DNA testing conducted on saliva left on a glass of water that the perpetrator drank from at the scene and *skin cells from the band of a hat* and from a sweatshirt worn by the perpetrator and discarded at the scene yielded the same STR DNA profiles. Because this DNA profile was different from Cowans' profile, the DNA evidence conclusively exculpated Cowans. After the DNA testing, the fingerprint was re-analyzed. After police concluded that the prior match was "a mistake" by both analysts, Cowans was exonerated and released from prison. *See* Jonathan Saltzman & Mac Daniel, *Man Freed in 1997*

Shooting of Officer, Judge Gives Ruling After Fingerprint Revelation, Boston Globe, Jan. 24, 2004, at A1.

2. The DNA evidence on the white hat is material to the identity of the perpetrator.

As mentioned above, modern DNA analysis of biological material in the white hat will likely provide DNA profiles that can identify who wore the white hat on the day of the shooting. Only miniscule amounts of biological material are needed for STR DNA testing. This testing is sensitive enough to identify multiple sources of DNA evidence even if more than one person wore the white hat. DNA profiles obtained can then be compared to Mr. Riofta's DNA profile and the DNA profile of the owner of the white hat (the person whose car was stolen). If neither profile matches the DNA profile uncovered by the testing, the DNA profile can be entered into the CODIS database to see if it matches a convicted felon's DNA profile. If a match is made, the CODIS database will provide the specific name and conviction history of the individual. If such a match is made in this case, additional investigation could then be undertaken to discover if the felon with the matching DNA profile had any connection to the circumstances of the crime or the gang that prosecutors believed instigated the Sok shooting.[17]

[17] As noted *supra*, prosecutors believed that the shooting was an attempt to intimidate Mr. Sok's brother who was cooperating with the State in its investigation of the gang-related

D. DNA Evidence Found on the Hat Will Likely Demonstrate Mr. Riofta's Innocence on a More Probable Than Not Basis.

The circumstances surrounding Mr. Riofta's case and the advanced technology that can be applied to untested evidence demonstrates that DNA testing on the white hat would likely show Mr. Riofta's innocence on a more probable than not basis. The only direct evidence presented against Mr. Riofta was the testimony of a single eyewitness. Mistaken eyewitness testimony has consistently proven to be the leading factor in convicting the innocent. In contrast, DNA testing can establish with scientific certainty, the true identity of the shooter. As discussed above, miniscule amounts of genetic material such as sweat, skin cells and hair that would ordinarily be found inside of a hat can be used to identify individuals who wore the white hat left at the scene of the crime. If the DNA profile extracted from the white hat does not match Mr. Riofta's DNA profile, it can be entered into the CODIS database to determine who matches the profile and will likely prove innocence on a more probable than not basis. Further, based on the legislative history of RCW 10.73.170 and established case law from other states, the statute should be applied permissively to allow petitioners to obtain potentially exculpatory

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Trang Dai shooting. Mr. Riofta's former appellate attorney received information from Jimmee Chea, a man convicted for his involvement in this shooting, that Mr. Riofta was not the true shooter. CP: 21-24. He stated that the actual shooter is a convicted felon whose profile would therefore be found in the CODIS database. Whether Mr. Chea is truthful or not, it serves as an example of how CODIS could be used in this case.

evidence. Stricter standards are more appropriately applied in stages where the DNA evidence is evaluated for its exculpatory value and the prospect of a new trial or exoneration is the central issue.

1. The State's case against Mr. Riofta – based on a single eyewitness identification – is weak, making it more probable than not that exculpatory evidence would be recovered from DNA testing.

The weaker the case against a petitioner, the more likely untested evidence could prove to be exculpatory. In other states, courts evaluating the strength of the evidence against a petitioner for postconviction DNA testing often look to the role that eyewitness identification played in the case. If eyewitness identification played a central role in the state's case, courts are more likely to grant motions for postconviction DNA testing. This Court should similarly consider the weight of the prosecution's evidence when assessing Mr. Riofta's request for testing. Because the State's case against Mr. Riofta was based on testimony from a single eyewitness, any potential new evidence carries great weight. The ability to discover exculpatory new evidence – combined with the weakness of the State's case – makes it likely that DNA testing would demonstrate Mr. Riofta's innocence on a more probable than not basis.

In *People v. Savory,* the Illinois Supreme Court recognized the importance of examining the strength of the evidence against a petitioner

when evaluating a motion for postconviction DNA testing. 197 Ill. 2d 203, 756 N.E.2d 804 (Ill. 2001). The *Savory* court noted that the substantive section of Illinois' postconviction DNA statute "cannot be determined in the abstract. Rather, it requires a consideration of the evidence introduced at trial, as well as an assessment of the evidence defendant is seeking to test." *Id.* at 214. *Savory* is an example of how strong prosecution evidence can negate the exculpatory potential of a postconviction DNA test. The petitioner, Mr. Savory, made several inculpatory statements to third persons and revealed knowledge of the crime scene to police officers that would only be known to the offender. The state presented further inculpatory physical blood evidence that clearly linked Mr. Savory to the crime. The Illinois Supreme Court upheld the denial of Mr. Savory's request for postconviction DNA testing because of the strong prosecution evidence.

In contrast, the Illinois Supreme Court granted the petitioner's request for postconviction DNA testing in *People v. Johnston,* 205 Ill. 2d 381, 793 N.E.2d 591 (Ill. 2002). *Johnston* distinguished *Savory* based on the comparative weakness of the prosecution's case. The court noted, "Unlike the defendant in *Savory*, the defendant here never made damning admissions placing himself at the crime scene. The State presented a strong, but largely circumstantial, case; the only direct evidence of the

defendant's guilt came from [a sole eyewitness] identification." *Id.* at 398. The court held that the trial court erred in refusing to allow postconviction DNA testing.

Other states have refined what types of cases are appropriate for postconviction DNA testing. As the Kansas Court of Appeals noted,

> Cases from other jurisdictions which have allowed postconviction DNA testing have at least two main similarities. First, each case involved a single perpetrator, which would make DNA testing determinative of the guilt or innocence of the defendant. Second, the State's evidence in each case was weak or the defense was sufficient to support a reasonable doubt.

Mebane v. State, 21 Kan. App. 2d 533, 538, 902 P.2d 494, 497 (Kan. Ct. App. 1995).

As in *Johnston,* the evidence against Mr. Riofta is weak. No physical evidence linked Mr. Riofta to the crime. Instead, the only direct evidence offered by the State was the testimony of a single eyewitness. Under the *Mebane* analysis, the fact that the crime against Mr. Sok involved a single perpetrator increases the probative value of the DNA test.

Unlike the certainty provided by scientific testing, identifications by eyewitnesses are subject to error. In this case, even though Mr. Sok's identification was made in good faith, there is reason to believe that his memory of the shooter was affected by the fact that he had seen Mr. Riofta

previously. When questioned by the police, Mr. Sok said that the shooter "looked like Alex." TR: 202, 222-223. This could mean one of several things, either (1) the shooter was a person that he knew to be Alex; (2) the shooter looked similar to a person the he knew to be Alex; or (3) through unconscious transference, Mr. Sok transposed Mr. Riofta's face on to that of the shooter.

Unfortunately, when the police showed their photomontage to Mr. Sok, the montage was not made up of people generally matching the description of the shooter, but was instead composed only of Asian men named "Alex" or "Alexander." When Mr. Sok saw Alex Riofta's picture, he identified him as the shooter. However, by this point, the victim may have convinced himself that Alex was the shooter based on his statement to the police that the shooter "looked like Alex." In addition, Mr. Riofta's picture was likely the only familiar one to the victim as he had seen Mr. Riofta previously. Although Mr. Sok positively identified Mr. Riofta, his physical descriptions of the shooter changed. TR: 204, 220, 222-223, 246.

An eyewitness, even when acting in good faith, can be wrong. Given that the prosecutor's case against Mr. Riofta was based on a single eyewitness identification, this Court should order DNA testing on the one piece of physical evidence that links the shooter to the crime. The power and certainty of DNA testing, when measured against the paucity of

evidence against Mr. Riofta, establishes a likelihood that such testing would demonstrate his innocence on a more probable than not basis.

2. The statute should be liberally construed to reflect the intent of the legislature.

Recent legislative history of RCW 10.73.170 demonstrates that there was overwhelming support in the Washington State Legislature to broaden prisoners' access to postconviction DNA evidence that could further their claims of innocence. The legislative history of the statute and case law from other states interpreting similar statutes warns courts not to impose too strict a burden on the petitioner at the request-for-testing phase.

a. The Legislature intended that prisoners be given greater access to exculpatory DNA evidence.

In construing a statute, the court's objective is to determine the legislature's intent. *State v. Jacobs*, 154 Wn. 2d 596, 600, 115 P.3d 281 (2005) (citing *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). RCW 10.73.170 received overwhelming support in the 2005 Washington State Legislature. Both witnesses and legislative sponsors of the bill referenced the need to use DNA evidence to "seek justice" for those wrongfully convicted of serious crimes. In order to achieve that goal, the legislature intended to allow prisoners broad access to DNA testing.

While the statute delineates reasonable requirements for a petitioner to satisfy, the legislature did not intend to require an inmate to *prove* his or her innocence *prior* to testing potentially exculpatory evidence. Former King County Superior Court Judge George Finkle noted this "Catch-22" in his testimony on January 28, 2004.[18] *Revising DNA Testing Provision: Hearing on Senate Bill 6447, Before the Comm. on Criminal Justice & Corrections,* 2004 Leg., 58th Sess. (WA 2004) . He contrasted the permissive standard that courts should apply when a petitioner seeks postconviction DNA testing with the "very tough standard" which is applied when a petitioner seeks a new trial. *Id.* Judge Finkle warned that RCW 10.73.170 should not "require a judge to find even before testing that the testing would in fact demonstrate innocence," stating that such a requirement would "put the cart before the horse" because "you can't demonstrate innocence until the results of the testing are known." *Id.*

The legislature was presented with the option of placing such a burden on a petitioner and decided against it. In the only testimony given against the bill in 2004, Tom McBride of the County Prosecutor's

[18] Because the language of the statute did not change in any significant way between the end of the 2004 legislative session and its passage in the beginning of 2005, the legislative history from the committee hearings in 2004 is highly relevant to the legislative intent of RCW 10.73.170. *See* House Bill Report HB 1014 (2005) . and Appendix 1(a-b).

Association urged the Senate Committee to consider the higher standard of "actual innocence" for the statute. *Revising DNA Testing Provision: Hearing on Senate Bill 6447, Before the Comm. on Criminal Justice & Corrections, 2004 Leg.*, 58th Sess. (WA 2004) . The committee heard his remarks and was given additional information about the actual innocence standard. *Id.* However, the bill that passed out of committee and was eventually adopted by both houses with unanimous support rejected the "actual innocence" standard, retaining the "more probable that not" standard. *See* House Bill Report SHB 1014 (2005) .

Principles of statutory construction also advise against applying an overly burdensome standard to requests for postconviction DNA testing. If a court determines that a statute is ambiguous, the rule of lenity requires the court to interpret the statute in favor of the defendant, absent legislative intent to the contrary. *State v. Jacobs*, 154 Wn. 2d 596, 601, 115 P.3d 281 (2005) (citing *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998)). Furthermore, Washington courts have indicated that statutes should be interpreted "as a whole in order to ascertain legislative purpose, and thus avoid unlikely, strained or absurd consequences which could result from a literal reading. That the spirit or the purpose of legislation should prevail over the express but inept language is an ancient adage of the law." *Alderwood Water District v.*

Pope & Talbot, Inc., 62 Wn.2d 319, 321, 382 P.2d 639, 641 (1963). It would be impossible, and therefore absurd, to require Mr. Riofta to prove what the DNA tests will establish before such tests are even conducted.

Recognizing the important role that DNA testing provides in proving innocence, the Washington State Legislature has continuously broadened prisoners' access to postconviction DNA testing. *See supra* Part II.C.1.a. The legislature intended the 2005 revision of RCW 10.73.170 to allow people like Mr. Riofta, convicted on the basis of evidence that is subject to error, access to powerful scientific testing to prove their innocence. However, the probative value of the testing can only be determined after such testing has been conducted. Thus, when Judge Orlando denied Mr. Riofta's motion for DNA testing on the white hat, he applied a standard better suited to a motion for a new trial, essentially "putting the cart before the horse."

b. Other states have warned against applying too strict a standard at the postconviction DNA testing stage.

When evaluating whether to order postconviction testing, other state courts have warned against "collapsing" the stricter standard applied to the new trial or exoneration phase into the more permissive standard that should be applied to requests for postconviction DNA testing. State courts' permissive tendencies to grant postconviction DNA testing

requests are rooted in a distinction made between a request for DNA testing (which is subject to a low evidentiary standard) and a hearing where the results of that test would be considered to free a prisoner or commence a new trial (which would be subject to a higher standard of proof). The Illinois Appellate Court stated that "the factors that trial courts often rely on in denying [postconviction DNA testing] motions are really more appropriately addressed in postconviction proceedings when the results of the testing may be considered." *People v. Henderson,* 799 N.E.2d at 693.

Courts "must be cautious not to 'collapse'" their consideration of a motion for postconviction DNA testing and a petitioner's "claim of actual innocence into a single analysis" *People v. Price*, 345 Ill. App. 3d 129, 135, 801 N.E.2d 1187, 1193 (Ill. Ct. App. 2003). They must "keep in mind that this is merely a motion for forensic testing." *Id.* at 140.

This Court should heed the legislature's intent as well as the guidance provided by other courts when interpreting and applying RCW 10.73.170. Mr. Riofta is unable to prove his innocence without knowing the results of the DNA test. When the trial court denied Mr. Riofta's motion for postconviction DNA testing, it erroneously collapsed the more stringent standard required for post-testing review into the permissive standard prescribed for testing.

E. Due Process and Fundamental Fairness Require That the White Hat Be Tested

The Due Process arguments that support Mr. Riofta's request for postconviction DNA testing are addressed in his *Personal Restraint Petition*, which is consolidated with this appeal and are incorporated by reference.

V. CONCLUSION

Mr. Riofta has maintained his innocence from the beginning of this case and merely seeks DNA testing of the sole piece of physical evidence linking the actual shooter to the crime. The fallibility of eyewitness identification, combined with the power of DNA technology, compels testing in this case. Such testing has the ability to not only exonerate Mr. Riofta, but also to identify the real perpetrator of the crime. Mr. Riofta respectfully requests that this Court reverse the trial court's decision and grant his request for postconviction DNA testing under RCW 10.73.170.

Dated this 9th day of December, 2005.

Respectfully Submitted,

INNOCENCE PROJECT NORTHWEST CLINIC

Jacqueline McMurtrie, WSBA # 13587
Attorney for Appellant

Joshua D. Field, Student Intern

Janel K. Ostrem, Student Intern

Appendix 1(a)

Current Post-Conviction DNA Testing Statute

RCW 10.73.170. DNA testing requests

(1) A person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.

(2) The motion shall: (a) State that: (i) The court ruled that DNA testing did not meet acceptable scientific standards; or (ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or (iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information; (b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and (c) Comply with all other procedural requirements established by court rule.

(3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

(4) Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request. Such motion for appointment of counsel shall comply with all procedural requirements established by court rule.

(5) DNA testing ordered under this section shall be performed by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(6) Notwithstanding any other provision of law, upon motion of defense counsel or the court's own motion, a sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved.

[2005 c 5 § 1, eff. March 9, 2005; 2003 c 100 § 1, eff. July 27, 2003; 2001 c 301 § 1; 2000 c 92 § 1.]

Appendix 1(b)

2004 Version of Postconviction DNA Testing Statute

10.73.170. DNA testing requests

(1) On or before December 31, 2004, a person in this state who has been convicted of a felony and is currently serving a term of imprisonment and who has been denied postconviction DNA testing may submit a request to the state Office of Public Defense, which will transmit the request to the county prosecutor in the county where the conviction was obtained for postconviction DNA testing, if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case. On and after January 1, 2005, a person must raise the DNA issues at trial or on appeal.

(2) The prosecutor shall screen the request. The request shall be reviewed based upon the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. The prosecutor shall inform the requestor and the state Office of Public Defense of the decision, and shall, in the case of an adverse decision, advise the requestor of appeals rights. Upon determining that testing should occur and the evidence still exists, the prosecutor shall request DNA testing by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(3) A person denied a request made pursuant to subsections (1) and (2) of this section has a right to appeal his or her request within thirty days of denial of the request by the prosecutor. The appeal shall be to the attorney general's office. If the attorney general's office determines that it is likely that the DNA testing would demonstrate innocence on a more probable than not basis, then the attorney general's office shall request DNA testing by the Washington state patrol crime laboratory.

(4) Notwithstanding any other provision of law, any biological material that has been secured in connection with a criminal case prior to July 22, 2001, may not be destroyed before January 1, 2005.

[2003 c 100 § 1, eff. July 27, 2003; 2001 c 301 § 1; 2000 c 92 § 1.]

Appendix 1(c)

2002 Version of Postconviction DNA Testing Statute

10.73.170. DNA testing requests

(1) On or before December 31, 2004, a person in this state who has been convicted of a felony and is currently serving a term of imprisonment and who has been denied postconviction DNA testing may submit a request to the county prosecutor in the county where the conviction was obtained for postconviction DNA testing, if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case. On and after January 1, 2005, a person must raise the DNA issues at trial or on appeal.

(2) The prosecutor shall screen the request. The request shall be reviewed based upon the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. Upon determining that testing should occur and the evidence still exists, the prosecutor shall request DNA testing by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(3) A person denied a request made pursuant to subsections (1) and (2) of this section has a right to appeal his or her request within thirty days of denial of the request by the prosecutor. The appeal shall be to the attorney general's office. If the attorney general's office determines that it is likely that the DNA testing would demonstrate innocence on a more probable than not basis, then the attorney general's office shall request DNA testing by the Washington state patrol crime laboratory.

(4) Notwithstanding any other provision of law, any biological material that has been secured in connection with a criminal case prior to July 22, 2001, may not be destroyed before January 1, 2005.

[2001 c 301 § 1; 2000 c 92 § 1.]

Appendix 1(d)

2000 Version of Postconviction DNA Testing Statute

10.73.170. DNA testing requests

(1) On or before December 31, 2002, a person in this state who has been sentenced to death or life imprisonment without possibility of release or parole and who has been denied postconviction DNA testing may submit a request to the county prosecutor in the county where the conviction was obtained for postconviction DNA testing, if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case. On and after January 1, 2003, a person must raise the DNA issues at trial or on appeal.

(2) The prosecutor shall screen the request. The request shall be reviewed based upon the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. Upon determining that testing should occur and the evidence still exists, the prosecutor shall request DNA testing by the Washington state patrol crime laboratory. Contact with victims shall be handled through victim/witness divisions.

(3) A person denied a request made pursuant to subsections (1) and (2) of this section has a right to appeal his or her request within thirty days of denial of the request by the prosecutor. The appeal shall be to the attorney general's office. If the attorney general's office determines that it is likely that the DNA testing would demonstrate innocence on a more probable than not basis, then the attorney general's office shall request DNA testing by the Washington state patrol crime laboratory.

[2000 c 92 § 1.]

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

vs.

STATE OF WASHINGTON,

Appellant.

No 33539-5

CERTIFICATE OF SERVICE

I certify that on December 15, 2005, I arranged for service by United Parcel Service the Petitioner's Opening Brief on:

Alexander Nam Riofta
DOC # 805644 / H-5-078U
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Michelle Luna-Green
Office of the Pierce County Prosecuting Attorney.
930 Tacoma Ave. S., Rm. 946
Tacoma, WA 98402

12/15/05 Seattle, Washington
DATE and PLACE

Cynthia S. Fester
CYNTHIA S. FESTER

PROF. JACQUELINE MCMURTRIE
INNOCENCE PROJECT NW CLINIC
UNIVERSITY OF WASHINGTON SCHOOL OF LAW
WILLIAM H. GATES HALL
BOX 353020
SEATTLE, WA 98195-3020
(206) 543-5780